

# **Structuring Teaming Agreements: Joint Ventures or Subcontracts?**

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# What is a small business?

- **Organized for profit**
  - **Place of Business in the U.S., operates primarily in the U.S., or makes a significant contribution to the U.S. economy (taxes, use of American products/labor)**
  - **Does not exceed the small business revenue OR employee size standard for the procurement**
    - Each North American Industrial Classification System (NAICS) code has a small business size standard (wholesale and retail NAICS are not used in government procurements).
- **13 CFR 121.105**

# NAICS Codes and Size Standards

• NAICS	Description	Revenue (M)	# employees
• 236210	Industrial Building Construction	\$33.5	
• 236220	Commercial and Institutional Building Construction	\$33.5	
• 237310	Highway, Street, and Bridge Construction	\$33.5	
• 315232	Women's and Girls' Cut and Sew Blouse and Shirt Mfg		500
• 323114	Quick Printing		500
• 336212	Truck Trailer Manufacturing		500
• 337211	Wood Office Furniture Manufacturing		500
• 484110	General Freight Trucking, Local	\$25.5	
• 492110	Couriers and Express Delivery Services		1500
• 493110	General Warehousing and Storage	\$25.5	
• 531110	Lessors of Residential Buildings and Dwellings	\$7.0	
• 541511	Custom Computer Programming Services	\$25.0	
• 541519	Other Computer Related Services	\$25.0	
• Information Technology Value Added Resellers			500
• 541611	Admin Management and General MGMT Consulting Svcs	\$7.0	
• 541620	Environmental Consulting Services	\$7.0	

[www.sba.gov/size](http://www.sba.gov/size)



# Size Must Include Affiliates

- What is an affiliate?
- When one controls or has the power to control another
  - Common ownership
  - Common control
  - Common management
  - Identity of Interest (family members, common investments, dependant through contractual relationships)
  - A Newly organized concern
  - Joint Ventures



- 13 CFR 121.103

# Average Annual Receipts

- Use Federal Tax Returns
- Cost of Goods Sold plus Total Income
- Average of last three completed fiscal years



- 13 CFR 121.104

# Number of Employees

- Count all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern.
  - Numbers of employees for each of the pay periods for the preceding completed 12 calendar months(running average).
  - Payroll records/IRS Form 941
- 13 CFR 121.106

# Two Types of Affiliation

- **General Affiliation**
  - On-going basis
  - Common ownership, common control, economic dependence, etc.
  - Applies to the company in all business transactions
- **For a specific procurement**
  - Joint venture
  - Applies only to the contract at hand

# Joint Ventures

- A joint venture is an association of individuals and/or concerns with interests in any degree or proportion consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally.
- The joint venture entity cannot be awarded more than three contracts over a two year period, starting from the date of the submission of the first offer or will be determined to have a general affiliation (3-in-2 rule).

• 13 CFR 121.103(h)



# Joint Ventures

- The same two (or more) entities may create additional joint ventures, and each new joint venture entity may be awarded up to three contracts.
  - ABC-XYZ JV
  - ABC-XYZ 1
  - ABC-XYZ 2
- However, such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between them.

# Joint Ventures Must be in Writing

- **A joint venture must:**
  - be in writing
  - do business under its own name.
- **It may (but need not):**
  - be in the form of a separate legal entity, and if it is a separate legal entity it may (but need not) be populated (*i.e.*, have its own separate employees).

# Joint Venture vs. Prime/Sub Relationship

- **SBA affiliation regulations purposely do not define “teams” or “teaming agreements”**
- **Joint Ventures**
  - Formal joint venture (Separate legal entity, such as LLC)
  - Informal (no new entity formed)
- **Prime Subcontractor Relationships**

# Teaming Arrangement: FAR 9.601

**“Contractor team arrangement,” as used in this subpart, means an arrangement in which—**

- Two or more companies form a partnership or **joint venture** to act as a potential prime contractor;
- A potential **prime contractor** agrees with one or more other companies to have them act as its **subcontractors** under a specified Government contract or acquisition program.

# What are the Benefits?

- **General benefit for all concerns both large and small:**
  - The joint or team is able to compete for larger more technically complex contracts by combining the capabilities and past performance of various team members.



- FAR 9.601

# Joint Venture Size Exemptions

## General Rule

**A joint venture is a small business concern when the combined revenue/employees of all joint venture partners do not exceed the small business size standard.**

# JV Size Exemption for “Large” Procurements

- **If:**
  - The procurement is bundled; or
  - It is a “large” procurement
    - For a procurement having a receipts based size standard, the dollar value of the procurement exceeds  $\frac{1}{2}$  the size standard; or
    - For a procurements having an employee based size standard, the dollar value of the procurement exceeds \$10 million.
- **Then, the joint venture is small if each joint venture partner is small.**

# What is an Ostensible Subcontractor?

- The acid test:
  - **A subcontractor is an ostensible subcontractor if:**
    - The subcontractor performs the primary and vital requirements, or
    - The prime contractor is unusually or unduly reliant upon the subcontractor.
  - **A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes.**
- 13 CFR 121.103(h)(4)



# What will be used to determine if Teaming Agreement is a JV?

- **Language Used in the Teaming Agreement**
- **Proposal wording**
- **Other circumstances:**
  - Reliance on Bonding
  - Who is in control/managing contract
  - Division of work (clear delineation)
  - Role in pursuit of contract
  - Whether subcontractor was the incumbent
- **“7 factor test” no longer used.**

# What is an Ostensible Subcontractor?

- Recent Case on Affiliation and Ostensible Subcontractors –  
[http://www.roseconsultingllc.org/Summary\\_of\\_Morris-Griffin\\_v.pdf](http://www.roseconsultingllc.org/Summary_of_Morris-Griffin_v.pdf)
- *Morris-Griffin v. C&L Service Corporation, 2010 WL 3221975 (E.D. Va)*
- *Large HUD loan processing company teamed with janitorial 8(a) company to win 8(a) set-aside contract to process loans for HUD – found to have fraudulently circumvented the SBA rules by using a nominal 8(a) contractor.*

# Points for Prime/Sub Relationships

- Agencies may consider an offeror's subcontractor's capabilities and experience under relevant evaluation factors where the RFP does not prohibit the consideration of a subcontractor's experience in the evaluation of proposals (*Roca Management Education & Training, Inc., January 15, 2004, GAO, B-293067*).
- The prime contractor is solely responsible for meeting all contract requirements, including the Limitations on Subcontracting percentage
- Must watch out for Ostensible Subcontractor relationship with its subcontractor(s)

# Limitations on Subcontracting

- Apply to cooperative efforts of the joint venture entity.
- Applies to full or partial small business set-aside contract, an 8(a) contract, a WOSB or EDWOSB
- Supplies: 50% cost of manufacturing excl mat'l
- Services: 50% with its own employees
- General Construction: 15% with its own employees
- Specialty Construction 25% with its own employees

13 CFR 125.6

## 8(a) Points for Joint Ventures

- For 8a contracts, the formal joint venture must be approved by SBA.
- For other contracts (i.e., SBSA, HUBZone set-aside), SBA does not need to approve the joint venture prior to award, but if the size status of the joint venture is protested, the provisions of §§124.513(c) and (d) will apply.
  - (c) – joint venture content requirements
  - (d) – performance of work requirements

# 8(a) competitive procurements

For competitive 8(a) procurements, the joint venture is considered small so long as:

- Each JV partner is small under the size standard for the procurement, and;
- The size of at least one 8(a) member of the joint venture must be less than  $\frac{1}{2}$  the size standard for the procurement; and
- It is a “large” procurement as shown on slide 16.

# Limitations on Subcontracting

- Anytime an 8(a) firm participates in a joint venture, the 8(a) partner to the joint venture must submit a report to its servicing SBA district office explaining how the applicable performance of work requirements were met for the contract, after the contract is complete.

# 8a Performance of Work Requirements

- In an unpopulated JV, the 8a partners must perform at least 40% of the work performed by the JV
  - 40% cannot just be administrative functions
- 13 CFR 124.513(d)



# 8(a) Mentor Protégé Agreement

- **For joint venture between 8(a) protégé and SBA approved mentor:**
  - The joint venture is considered small so long as the 8(a) protégé is small for the procurement.
    - 13 CFR 124.513(b)(3)
  - The joint venture may bid as a small business on any federal prime or subcontract.
    - 13 CFR 121.103(h)(3)(iii)

# 8(a) Mentor Protégé

- **Must have a joint venture**
- **Must have a joint venture with all the elements of 13 CFR 124.513(c)**
- **Must meet the performance of work requirements in 13 CFR 124.513(d)**
- **If an 8a procurement, JV agreement must be approved by SBA**

# HUBZone Joint Ventures

- A HUBZone may only joint venture with another HUBZone concern (even applies to mentors).
- The JV itself need not be certified as a HUBZone concern.
- If it is a “large” procurement, it can qualify as small as long as each HUBZone partner is small for the NAICS code assigned to the procurement.

# HUBZone Limitations on Subcontracting

- The aggregate of the HUBZone partners or HUBZone subcontractors must perform the applicable percentage of work required by 13 CFR 125.6.
  - see 13 CFR 126.7 for application for general and specialty construction contractors.

13 CFR 126.7

# HUBZone Mentor Protégé

- A HUBZone may enter into a Mentor-Protégé Agreement
- The mentor and protégé will not be found affiliated on the basis of the Mentor-Protégé Agreement when it is a Federally –approved Mentor Protégé relationship.
- The HUBZone that is a prime contractor on a HUBZone contract may team with and subcontract work to its mentor. The mentor may not perform the primary and vital requirements of the contract.

# Provisions for Service-Disabled Vets

- A SDV may enter into a JV Agreement with one or more other small businesses for purposes of a SDV contract
- For JV partners are affiliated unless it is a “large” procurement.
- The JV Agreement must comply with 125.15(b)(2) – the required contents of a SDV joint venture agreement
- The JV must perform the percentage of work requirements in 13 CFR 125.6

# EDWOSB or WOSB Joint Ventures

- For JV partners are affiliated unless it is a “large” procurement.
- The EDWOSB or WOSB participant must be designated in CCR and ORCA as an EDWOSB or WOSB.
- There must be a written joint venture provided to the Contracting Officer that contains the elements of 13 CFR 127.506.
- The JV must perform the applicable percentage of work in 13 CFR 125.6

# Where Can I Find the CFR

**Federal Regulations (CFR) on-line:**

- **<http://ecfr.gpoaccess.gov>**

**Size regulations -- 13 CFR Part 121**

**8(a) & SDB regulations -- 13 CFR Part 124**

**Government Contracting Programs – 13 CFR Part 125**

**HUBZone Program – 13 CFR Part 126**

**Service Disabled Veteran Program – 13 CFR 125.8-28**

**Women-Owned Small Business Program-13 CFR 127**



# Contact Information

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